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No. 96-741

In The

Supreme Court of the United States

October Term, 1995

FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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DISCUSSION

The U. S. Department of Labor (hereinafter Respondent) has alleged on page 6 of its Brief for the Respondent in Opposition, that Petitioner "now raises a panoply of new arguments, which may not be raised for the first time before this Court." Respondent's allegations are clearly erroneous and without merit. Every argument raised by Petitioner in its Writ for Certiorari has been raised numerous times below, as substantiated by the record.

The arguments contained in Issue I with regards to principles of federalism have been prevalent throughout this litigation. The Job Training Partnership Act and its Legislative History, which is the legal basis upon which this matter reached the courts, embrace and echo the very principles of federalism which permeate this case. These issues were addressed in Petitioner's Post-Hearing Brief to the Administrative Law Judge, pages 5-7 and pages 44-45 (Appendix ("App."), *infra,* 1a-3a, 9a-10a). Likewise, Petitioner raised the same issues before the United States Court of Appeals for the Eleventh Circuit in its Initial Brief on pages 42 through 44 (App. 26a-28a) and in Petitioner's Suggestion for Rehearing En Banc before the United States Court of Appeals for the Eleventh Circuit on pages 4-5 and page 7 (App. 29a-30a, 32a-33a).

Petitioner's arguments contained in Issue II do not constitute new arguments before this Court but represent a basis for asserting the certiorari jurisdiction of the Supreme Court. Supreme Court Rule 10.1(a) clearly provides that a basis for asserting the jurisdiction of this Court is the presence of a Court of Appeals decision which conflicts with another decision of a Court of Appeals. Petitioner established in Issue II that the decision to be reviewed conflicts with other Court of Appeals decisions. Clearly such conflict could not be raised before a

conflicting decision was rendered by the United States Court of Appeals for the Eleventh Circuit.

In regard to arguments raised in Issue III, the underlying issues in this case have always centered around actions taken by Respondent, to the detriment of Petitioner, which have not been in accordance with federal laws or regulations. In spite of the evidence and arguments presented to the court on specific errors of law committed by the Respondent, the Eleventh Circuit sanctioned the continued departure from law practiced by Respondent. These issues were raised in Petitioner's Post Hearing Brief to the Administrative Law Judge on pages 38-45 (App. 4a-10a); Petitioner's Initial Brief to the United States Court of Appeals for the Eleventh Circuit on pages 17-20 and pages 31-40 (App. 11a-15a, 15a-24a); and in Petitioner's Suggestion for Rehearing En Banc, pages 5-11 (App. 30a-37a).

CONCLUSION

Petitioner understands that a writ to invoke the certiorari jurisdiction of this Court is designed to be short and concise and without unnecessary detail as provided in Supreme Court Rule 14. In deference to this rule, Petitioner's Writ for Certiorari addressed the basis for the request without providing cumbersome details. If this writ is accepted, Petitioner's issues will be briefed in meticulous detail as the legal basis underlying this request are of the utmost importance.

Respectfully submitted,

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APPENDIX A — EXCERPTS FROM FLORIDA'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

HISTORICAL BACKGROUND

USDOL is the administrator under the JTPA of federal grant funds for the training and re-employment of low-income workers and other individuals facing serious barriers to employment. During the seven years immediately following the enactment of the JTPA, which period is covered by this audit, USDOL implemented regulations which gave deference to State policies. This deference recognized Congress's unequivocal intent for the Governor to exercise the primary supervisory role over the state's job training program. During this period, policy decisions rendered by Governors went undisturbed, unless found to be inconsistent with the JTPA and its regulations. However, with the audit in question the Grant Officer abandoned the longstanding deference previously accorded the Governor and violated the fundamental principles of federalism upon which the JTPA was premised.

The 97th Congress enacted the JTPA to replace the Comprehensive Employment and Training Act (CETA), a federally sponsored job training program, which had proven less than extravagantly successful; "informed opinion seems to suggest that *excessive federal involvement* was partially to blame for CETA's problems." *Hernandez-Colon v. Secretary of Labor,* 835 F.2d 958 (1st. Cir. 1988). With the failures of CETA in focus, Congress designed the JTPA and opined that the new law would "substitute state management for federal management of the job training function, recognize the role of the state in all local programs, and end the excessive involvement of the federal government." *Id.* at 961, N.3, citing S. Rep. No. 469, 97th Cong. 2d Sess. 2, reprinted in 1982, U.S. Code Cong. and Admin. News 2636, 2637.

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Congress was also guided by four basis principles it deemed essential for an effective job training program, which required the Governor and private sector involvement, with emphasis on performance results.[6]

In recognition of these principles, see note 6, which clearly supplanted the federal government from administration of the JTPA and gave the primary responsibility to the Governor, regulations were enacted at 20 C.F.R. parts 626 through 638. More specifically, the provisions at 20 C.F.R. § 627.1 embodies the fundamental notions of federalism[7] Congress sought to

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6. The pertinent language of the principles held: First, the new legislation must provide for the involvement of the private sector in the design and administration of training programs. Under the current CETA system, business involvement has been limited to Title VII programs, and there is no requirement for the involvement of the private sector in all aspects of the program. . . .

Second, job training legislation must recognize the true principles of *federalism. . . . The new legislation will recognize the role of the state in all local programs and end the excessive involvement of the federal government.*

Third, job training legislation must truly be a *training legislation* and not an *income maintenance program. . . .*

Fourth, the legislation must insist on performance. . . . The new legislation will provide standards for judging the programs by what they accomplish-by whether those trained are hired and earn more as a result of training. It will end federal involvement with the process of how people are to be trained. It will provide for measurement of the outcomes and remove the Federal government from involvement in the details of program operations. (emphasis added). S. Rep. No. 469, supra, at 3, 1982 U.S. Code Cong. and Admin. News at 2637-2638.

7. The Senate in discussing its notion of federalism, provided in relevant (Cont'd)

embrace in the JTPA, and required the Secretary and Governor to sign an agreement to include the following provision:

> "guidelines interpretations and definitions adopted by the Governor shall, to the extent that they are consistent with the Act and applicable rules and regulations, be accepted by the Secretary."

Clearly, this provision captured the Congressional intent under lying the JTPA to respect and defer to the States autonomy, and reinforced the system of dual sovereignty between the states and the national government, established by the U.S. Constitution.

* * *

(Cont'd)
part: Under the legislation reported by the Committee, the state will be the key actor in the approval of job training programs. First, *and perhaps most important, the state will define the structure of the delivery system through the determination of service delivery areas.* This critical determination will be done by the Governor after receiving the proposals of local government and business officials. The Governor will also be in charge of approving local developed plans, of monitoring and auditing the performance of plans, of insuring fiscal responsibility and compliance with Federal mandates as well as of running statewide programs. *In short, the basic supervisory role previously performed by the federal government will now be turned over to the state, the place where it really belongs.* (emphasis added) *Id.* at 2638.

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V.

USDOL HAS MISCONSTRUED THE LAW AND VIOLATED ITS OWN REGULATIONS

USDOL has violated it own regulations in advancing this audit. The attempt to override the authority of the Governor is in direct conflict with 20 C.F.R. § 627.1. Under this provision the Secretary of USDOL agreed to defer to the Governors guidelines, interpretations, and definitions if not inconsistent with the applicable rules and regulations. (RX-l-p. 97).

It is well settled in the law that agencies are required to follow their own regulations. *Chicano Educ. and Manpower Sev. v. Department of Labor,* 909 F.2d 1320, 1327 (9th Cir. 1990); citing *Service v. Dulles,* 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed 2d 1403 (1957); *Memorial, Inc. v. Harris,* 655 F.2d 905, 910-11 N. 14 (9th Cir. 1980). "Congress recognizes that it can only legislate, not administer, so it necessarily relies on agency action to make "common sense" responses to problems that arise during implementation, so long as those responses are not inconsistent with Congressional intent. *Cablevision System v. Motion Picture Assoc.,* 836 F.2d 599 (C.D. Cir. 1988). Even if the action of an agency is discretionary by statute, an agency's own regulations must be complied with by the agency. *California Human Development Corp. v. Brock,* 762 F.2d 1044, 1049 (D.C. Cir. 1985).

As the Governor of Florida and USDOL Secretary Donovan signed the agreement in 1983 such agreement binds USDOL to accept the guidance given to the Florida job training community by the Governor, unless inconsistent with the law and regulations. The record clearly established that USDOL did not

articulate any rule or regulation which is inconsistent with the policy decisions rendered by the Governor.

Secondly, USDOL has violated the spirit of its regulation at 20 C.F.R. § 629.35(e), which addresses the minimum period of time JTPA records are to be maintained. The record retention provision provides in part:

> . . . For funds allotted to a State for any program year, records must be retained for two years following the date on which the annual expenditure report containing the final expenditures charged to such program year's allotment is submitted to the Department of Labor. Records for nonexpendable properly shall be retained for a period of three years after final disposition of the property.

This provision requires the Governor to ensure that records pertinent to JTPA grants are retained a maximum of three years, unless an audit or litigation has commenced, then records must be maintained until matters are resolved.

By the terms of its own regulations, USDOL did not envision an indefinite JTPA and WPA record retention period. Yet, the Grant Officer in total disregard of USDOL's own regulation and of Florida's reliance on the regulation, disallowed costs from program years 1983 through 1989, by simply listing contract numbers from Florida's profits and loss ledger. This regulation does not accord any discretion to USDOL to shift its retention requirements in a manner detrimental to Florida. Such sweeping disregard for it own regulation is not supported by the law or the facts.

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When this audit was performed, contractual records for program years 1983 through 1985 had been destroyed. This fact is attested by the uncontradicted sworn affidavits of Jerome Jones and Jerome Dilworth, previously filed in this cause.[17] Even though Florida's Auditor General expressed some concern for Florida's procurement system involving ESJS, the concerns did not rise to the level of audit or litigation for the purposes of record retention in 20 C.F.R. 629.35(e). As no other audits or litigation existed which required the maintenance of records beyond the minimum retention period, and USDOL did not instruct Florida to maintain the records beyond the minimum period, any disallowed cost associated with these years should be summarily dismissed.

Additionally, the Grant Officer has misapplied the provisions of Section 161(b) of the JTPA and Section (5)(c) of the Wagner-Peyser Act, as amended in claiming that the three year window of availability for use of the funds has expired. The Governor directed that excess revenues loose their program identity and may be used for any governmental purpose, consistent with the earning entities responsibility. (RX-1-Pgs. 32, 34). These directions were provided during a period when USDOL chose not to regulate in the area.

Likewise, contrary to the Grant Officer's position, the disposition of the funds in question are not governed by Section 161(b) of the JTPA, or by Section 5(c) of the Wagner Peyser Act, as amended. Those sections provide a three year period for the expenditure of obligated funds. This three year window of

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17. See Florida's response to Grant officers motion for orders finding that evidence not produced would have been adverse to complainant dated September 3, 1993.

availability, is inapplicable because the profits in question were not obligated funds. On March 13, 1989, USDOL published an interpretative regulation in Federal Register, Vol. 54 No. 47, effective July 1, 1989, which provides that profits generated in excess of cost maintain their federal identity and must be used for program purposes; however, the Grant Officer concedes that profits properly earned prior to July 1, 1989 are not bound by this interpretation or by the three window of availability.[18] (CX-p. 103).

Florida will respect and follow this provision; however, to the extent USDOL did not regulate the area prior to July 1, 1989, the Governor's policy controls.

VI.

USDOL HAS VIOLATED THE ADMINISTRATIVE PROCEDURE ACT

USDOL has failed to adhere to the requirements of the Administrative Procedures Act (APA), 5 U.S.C.A. § 552, which requires each agency and authority of the United States to publish rules in the Federal Register for public guidance. The provision requires in relevant part:

> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —
>
> (D) substantive rules of general applicability

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18. The law regarding unlawful retroactive application was discussed length in Florida Motion For Summary Judgment (CX-25).

> adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by he agency; . . .

The law further provides:

> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to report to, or be adversely affected by a matter required to be published in the Federal Register and not so published.

It is fundamental that administrative actions taken pursuant to unpublished rules will not be allowed to stand against persons adversely affected thereby. *Coby Transfer and Storage v. Froehlke,* 480 F.2d 498 (4th Cir. 1973). Except however, if actual and timely notice of the terms of the procedures to be followed is given, agencies are exempt from this principle. *Northern California Power v. Morton,* 396 F. Supp. 1187 (1975).

By its own admission, USDOL's first official interpretation of the utilization of fixed unit price performance based contracts by governmental entities was the interpretative regulation, effective July 1, 1989. Rules concerning conflicts of interest have not been published.

Edward Donahue testified that concerns were raised by USDOL in Employment and Training Guidance Letter 3-87, dated November 18, 1987, on the possible misapplication of fixed unit price performance based contracts; however, the letter did not prohibit the use of such contracts. (CX-1-Exhibit E).

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Additionally USDOL's solicitation for comments in the Federal Register, Vol. 53, No. 48, March 11, 1988, on the generation of profits utilizing fixed unit price performance based contracts did not restrict the use of these type contracts by governmental entities nor did it prohibit or restrict the use of profits lawfully earned. (CX-1-pgs. 61-63). USDOL's concerns do not constitute a rule or regulation such that Florida should be penalized as the Grant Officer seeks in this matter Florida was not provided actual or timely notice of any prohibitions in its contracting methods and should not be sanctioned for USDOL's failure to so provide as required by the APA.

VII.

THE GRANT OFFICER IS NOT EMPOWERED TO ABROGATE THE GOVERNOR'S DECISION, ABSENT SPECIFIC STATUTORY AUTHORITY

The findings of the Grant Officer epitomize the type federal intervention in Florida's job training program which Congress disavowed. The legislative history of the JTPA does not suggest any Congressional intent for the Grant Officer to usurp the longstanding discretion accorded to States and the Governor.

The Supreme Court recently observed: "The Constitution created a Federal Government of limited powers." The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our Constitutional system." *Gregory v. Ashcroft,* 111 S.Ct. 2395 (1991). The Supreme court has further observed: "If Congress intends to alter the usual constitutional balance between the

States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft,* supra, quoting *Atascadeso State Hospital v. Scanlon,* 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed. 2d 171 (1985). With the JTPA legislation, Congress clearly embraced the need to reinforce the system of dual sovereignty established by the Constitution, and adopted a balance of power between the states and the Federal Government. See note 6, supra. It has been consistently recognized by the courts that congressional intent in enacting a statute will indicate whether a federal statute preempts state law. *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). While legislative intent may be manifested in several ways, chief among the indicators is where Congress has legislated so comprehensively and has left no room for supplementary state legislation. *R.J. Reynolds Tobacco Co. v. Durham County, N.C.,* 107 S. Ct. 499 (1986).

Congress did not express or imply pre-emption in the JTPA. Consequently, this matter does not involve conflicting laws or regulations nor does it involve an area where Congress has regulated the field. On the contrary, we have an attempt by the Grant Officer to usurp decisions made by the Governor, without expressed or implied statutory or regulatory authority to do so, on any issue he has raised. Absent such authority, the Grant Officer's findings constitute a violation of the states sovereignty, pursuant to the Tenth Amendment, and a violation of the congressional intent underlying the JTPA.

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APPENDIX B — EXCERPTS FROM INITIAL BRIEF OF APPELLANT, STATE OF FLORIDA FILED IN THE ELEVENTH CIRCUIT

* * *

a. The Grant Officer Did Not Have Sufficient Factual Grounds or Legal Basis Upon Which to Question the Validity of the Contracts.

1. THE INTRODUCTION OF ONE CONTRACT OF 250 IN QUESTION IS STATICALLY INSUFFICIENT TO MEET BURDEN OF PROOF

The findings of the ALJ as to the insufficiency of evidence clearly explicate the correct ruling on this point. In relevant part the order reads:

> Pursuant to 20 C.F.R. section 629.57(i)(APX-15) USDOL has the initial burden of production in this case. This means that USDOL must put forth evidence sufficient to establish a *prima facie* case in support of the alleged JTPA violations. This burden requires USDOL to produce relevant evidence "sufficient to enable a reasonable person to draw for it the inference sought to be established." McCormick, *Evidence*, 789-790 (2d ed. 1972). Once USDOL has met its *prima facie* burden, the burden of production then shifts to DLES to show compliance with the pertinent provisions of the JTPA. *Maine v. United States Dept. of Labor*, 669 F.2d 827 (1st Cir. 1982). Nonetheless, the ultimate burden of persuasion rests with DLES

throughout the entire case. 20 C.F.R. section 629.57(i). The burden of persuasion never shifts to USDOL.

With respect to the first issue of the case, whether DLES inappropriately charged profits to the training cost category, 20 C.F.R. section 629.38(e)(2) provides the relevant law. During the period of the audit, 20 C.F.R. section 629.38(e)(2) set forth three requirements to be met before a cost may be billed entirely to the training category. In such cases, the agreement between the program recipient and the service provider must be for training, must be fixed unit price, and must stipulate "that full payment for the full unit price will be made only upon completion of training by a participant and placement of the participant. . . ." 20 C.F.R. section 629.38(e)(2) (1988).

In support of its contention that DLES violated this regulation, USDOL offers only one contract between DLES and Manasota Industry Council, Inc. (Manasota). The Manasota contract does appear to violate the provisions of 20 C.F.R. section 629.38(e)(2) in that the contract contains both fixed unit price characteristics and cost reimbursement characteristics. (USX-3 at 6; Tr. at 202.) However, USDOL *produces the Manasota contract* alone as evidence that all of the *250* contracts that were the subject of the audit

> violated 20 C.F.R. 629.38(e)(2) as well. In fact, the auditor himself admitted that he never even examined the remaining 249 contracts for violations of the JTPA regulations. (TR. at 218, 220.) The fact that one contract out of 250 violated 20 C.F.R. Section 629.38(e)(2) does not allow a reasonable person to infer that all 250 contracts violated the same provision without any further evidence. Therefore, I find that USDOL *has failed to meet its initial burden of production* to substantiate *its claim that* DLES violated 20 C.F.R. section 629.38(e)(2). Without offering further evidence, USDOL cannot expect to overcome even the relatively week burden of establishing a *prima facie* JTPA violation solely on the basis of the Manasota contract. (RDoc.65, pp. 5 & 6.)

The evidence conclusively established that the Grant Officer did not have sufficient factual grounds upon which to question the validity of the contracts. Jimmy Woodward, who supervised and conducted the audit on behalf of the USDOL-OIG, testified without contradiction that the audit team did not look at individual contracts to determine compliance with 20 C.F.R. § 629.38(e)(2) (APX-7). (RDoc. 41, p. 220.) The deposition of Edward Donahue, USDOL Grants and Compliance Specialist, (RDoc.41, p. 183) provides further corroboration that the contracts were not reviewed *before* or *after* the costs associated with them were disallowed. (RDoc.42, FLX-1-pp. 90, 91.) When questioned at the hearing on whether Florida was given notice in the USDOL-OIG Report of any alleged improprieties in 250 contracts, Mr. Donahue testified as follows:

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> Donahue: I indicated earlier that it was an independent decision of the Grant Officer to raise the question of whether or not the contracts met the requirements of 629.38(e)(2). It was not an issue raised by the OIG auditors. (RDoc. 41, p. 189).

Likewise, Mr. Donahue testified that he did not have any information on what contracts did not meet the requirements of 629.38(e)(2) because the contracts were not examined. (RDoc. 42, FLX-1-p. 91.)

In *Northport Health Services v. NLRB*, 961 F.2d 1547 (11th Cir. 1992), the issue of substantial evidence necessary to support an administrative order was addressed. Therein, the Eleventh Circuit reversed a decision rendered by the NLRB and opined that agencies cannot rest conclusions on a *scintilla of evidence* or even on any amount of evidence that is less than substantial, nor can decisions be based on facts that are not supported by the record. *Id.* at 1550, citing *Universal Camera Co. v. NLRB*, 340 U.S. 474 477, 71 S. Ct. 456, 459, 95 L.Ed. 456 (1951) quoting, *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938).

In this case, the Grant Officer has not presented even a scintilla of evidence which under *Northport, supra*, would still be insufficient to support his sweeping disallowance. There is no rational connection between reviewing one contract executed in 1983 between one of 24 SDAs and one out of approximately 80 ESJS offices and summarily disallowing costs related to all contracts involving the ESJS offices for seven program years, especially when none of the contracts was reviewed. As recognized by the Supreme Court in *Consolidated Edison Co.*

v. NLRB, supra, the basis in evidence must have a rational probative value, mere uncorroborated hearsay or rumor does not constitute substantial evidence. *Id.* at 217. The Grant Officer can hardly substantiate allegations when, admittedly, the contracts were not reviewed for adherence to 20 C.F.R. 629.38(e)(2).

* * *

II.

THE RECORD DOES NOT CONTAIN COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE CONCLUSION OF THE AGENCY HEAD THAT THE REALIZATION OF EARNINGS BY THE STATE AGENCY RESULTED FROM THE LACK OF SOUND MANAGEMENT PRACTICES AND FROM CHARGES TO THE FEDERAL GRANT WHICH WERE NOT NECESSARY AND REASONABLE FOR PROPER AND EFFICIENT ADMINISTRATION OF THE GRANT PROGRAM.

As a legal basis for finding that profits indicate that costs charged to the contract were unreasonable, the USDOL looked to OMB Circular A-87 and 20 C.F.R. § 629.37 (a) (APX-6). Even before the hearing, the USDOL had conceded that the generation of profits during the period of the audit in question did not violate JTPA or its regulations (see RDoc. 46, USX-15; and RDOC. 47 ALJX 17, respectively). So too did the parties stipulate (see RDoc. 65, Stip. 10). At the hearing Mr. Woodward testified that profits were not illegal during the period of the audit (RDoc. 41, TR p. 245), and Edward Donahue corroborated this position in his deposition, testifying that revenues properly

earned prior to July 1, 1989, were not violative of the laws or regulations. (RDoc. 42, FLX-1, p. 38, line 7 through p. 39, line 5.)

a. The Record Lacks Sufficient Evidentiary Basis to Support Finding That Costs Charged to Grant Were Not Reasonable and Necessary.

The Secretary has found that the level of profits involved violated 20 C.F.R. § 629.37(a) (see APX.6).[5] That rule is a catch-all regulation with the basic requirement that all cost be "necessary and reasonable for proper and efficient administration of the [JTPA] program. . . ."

The Secretary maintains that the obligation to produce substantial factual evidence was met by the information contained in JTPA Revenue Account G-3880 (RDoc. 71, pp. 7 & 8).

The Secretary concluded that the profits indicate costs were charged to the contract which were not necessary. The relevant facts as garnered by the Secretary are:

> . . . The Detail Summary of the account lists each subgrant by Program Year and JTPA

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5. Section 629.37 Allowable Costs. (a) General. To be allowable, a cost must be necessary and reasonable for proper and efficient administration of the program, be allocable thereto under these principles, and, except as provided herein, not be a general expense required to carry out the overall responsibilities of the Governor or subrecipient. Costs charged to the program shall be consistent with those normally allowed in like circumstances in non-federally sponsored activities and with applicable State and local law, rules or regulations, as determined by the Governor.

> title, and indicates that 160, or 65%, of the contracts produced a high level of profits to make up the total losses incurred by the remaining 35% of the contracts and still show an excess net of profit of almost $1 million. (RDoc. 71, p.7).

The facts contained in the Secretary's analysis of JTPA Revenue Account are not part of the record. However, the record does show the Grant Officer and the Audit Supervisor for the USDOL-OGI admitted that the contracts associated with the $961,003.00 being disallowed, were not reviewed or analyzed by the auditors during the audit or by the Grant Officer during his review of the audit report or during his decision to disallow the costs (RDoc. 41, p. 220). Mr. Woodward admitted that the purpose of the audit was to find the source of the $800,000 payment. He related that during the audit, the audit team focused primarily on the financial records and funding sources. He further testified that the auditors did not look at individual contracts to determine, if they adhered to federal regulations for fixed unit price performance based contracts. (RDoc. 41, p. 220.) In fact, in a deposition on behalf of the Grant Officer, Mr. Donahue testified that the Grant Officer could not provide any information to Florida on which of the 250 contracts violated various aspects of 20 C.F.R. § 629.38(e)(2) (APX-7), in that the contracts were not reviewed by the Grant Officer. (RDoc. 42, FLX-1, p. 91.)

According to the Secretary, OMB Circular A-87 provides the objective criteria for determining that the profits were not legal. In Federal Register, Vol. 53. No. 48, p. 7992, March 11, 1988, USDOL indicated that Office of Management and Budget officials involved in the initial drafting of CMB-A-87 advised

ETA that the circular did not anticipate or address the question of profits by state or local governments. (RDoc. 28, Tab 5 at p. 7992, bottom of middle column, APX-19.) Mr. Donahue conceded in his deposition that the principles of OMB Circular A-87 do not apply to fixed unit price performance based contracts (R.Doc. 42, FLX-1-pp. 64-66).

Nevertheless, the Secretary determined that the profits were in violation OMB A-87 for two reasons: 1) the provision provides that profits are not intended, and 2) the contracts in question were not negotiated at "arms length," and, therefore, were not reasonable. Neither of the reasons is supported by substantial evidence; therefore, the resulting conclusions are arbitrary and capricious, as shown by the following discussion.

b. The Record Does Not Contain Any Competent Proof That OMB Circular A-87 Proscribes the Realization of Profits By State Agencies.

According to the Secretary, the *Purpose and Scone* section of OMB A-87 clearly provides that state agencies are not to realize profits from federal grants (RDoc. 71, p. 9). That section of the circular reads:

> 1. *OBJECTIVES.* This attachment sets forth principles for determining the allowable costs incurred by State . . . governments under grants . . . with the Federal government. . . . The principles are for the purposes of cost determination. . . . They are designed to provide that federally-assisted programs bear their fair share of costs recognized under these principles, except where restricted or

prohibited by law. No provision for profit or increment above cost is intended.

The Secretary has determined that the sentence, "No provision for profit or increment above cost is intended [.]" proscribes profits. According to the Secretary, the word "intended" is a "form of the noun intention." (RDoc. 71, p.8) The basis for this conclusion is not stated. However, the plain reading of the provision reveals "is intended" to be a verb, passive voice — a form of the verb "be" plus a past participle. Perrin, Porter G., George H. Smith & Jim W. Corder, *Handbook of Current English*, 3d. Edition, Scott, Foresman and Company, 1968. Assuming that the word "intended" is the past participle of the verb intend, it means "to have in mind as a purpose or goal, to design for a specific use; signify, mean, to direct the mind on." *Webster's Ninth New Collegiate Dictionary Merrian*, Webster Inc., Publishers (1991). The definition found in *Black's Law Dictionary*, Sixth Edition, West Publishing Co., St. Paul, Minn. (1990), reads: "To design, resolve, propose. To plan for and/or expect a certain result. To apply a rule or law in the nature of a presumption, to discern and follow the probabilities of like cases. See also intent." Thus, "is intended" could be exactly what the Secretary says it is not: precatory. It can be used to "propose."

The Secretary's order interprets the word "intended," as used in OMB Circular A-87. The Office of Management and Budget (OMB) issues the circulares describing the principles to be applied in assessing costs charged to various grants. The OMB is an agency separate from the USDOL. See 31 U.S.C.A. § 501 *et seq.* and 42 U.S.C.A. § 12651 *et seq.* The interpretations of the OMB circulares rendered by USDOL are not entitled to any deference. Deference is accorded an agency's interpretation of

its own rule, not that of another agency. See *Wiggins Bros., Inc. v. Department of Energy*, 667 F.2d 77 (Temp. Emergency Ct. of Appeals 1981), cert. denied 102 S. Ct. 1749, 456 U.S. 905, 72 L. Ed. 2d 161, on remand 548 F. Supp. 547.

c. OMB Circular A-87 Does Not Provide Any Objective Criteria Upon Which to Determine Whether Costs Charge to Federal Grants Were "Necessary and Reasonable."

The Secretary found that OMB Circular A-87 provided the objective criteria necessary to determine whether the costs were "necessary and reasonable."[6] (RDoc. 71, p. 11). The provision reads:

> 2. *Reasonable costs*
>
> A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness of specific costs must be scrutinized with particular care in connection with governmental units or subdivisions thereof which receive the preponderance of their support from awards made by Federal agencies. In determining reasonableness of a given cost, consideration shall be given to:
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6. It was necessary to go outside of JTPA for objective criteria in that, as the parties stipulated, the USDOL did not issue any rules or regulations as guidance on contract negotiations. (RDOc. 65, p. 2, Stip. 13.)

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> b. The restraints or requirements imposed by such factors as sound business practices, arms length bargaining, Federal, *State* and other laws and regulations, and terms and conditions of the Federal awards. (Emphasis supplied.)
>
> * * *
>
> d. Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the governmental unit, its employees, the public at large and the Federal Government.
> OMB Circular A-87, Attachment A, Part C.2., (RDoc. 45, p. 86).

According to the Secretary, the costs could not have been reasonable and necessary in that the contracts were not negotiated at arms length (RDoc. 71, p. 11). At the heart of this controversy is the intra-agency contracting. The Bureau of Job Training ("BJT") and the Florida Employment Service ("FES") are units of the Division of Labor, Employment and Training ("DLET"), which is a division of the Department of Labor and Employment Security ("DLES"). DLET is administratively responsible for JTPA. (RDoc. 45, p.20.) The Florida Employment Service local offices entered into approximately 250 fixed unit price, performance-based contracts with BJT and various JTPA Service Delivery Area (SDA) subgrantees which were monitored by DLET. (RDoc. 45, pp. 70-75.)

The parties have stipulated (RDoc. 65, p. 2, Stip 13.) that during program years 1984 to 1989, there was no language in

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OMB Circular A-87 that specifically addressed arms length negotiation. In fact, while the specific language cited in the order of the Secretary lists arms length bargaining as an important consideration in determining the reasonableness of a cost under the JTPA, this language did not appear in the Federal Register until October 1988. 53 Fed. Reg. 40352, 40354 (1988) (*proposed* October 14, 1988). (RDoc. 28, Tab 2 at 40352, last column, APX-22.) Thus, although there was a general requirement that all costs be "reasonable" during the period of the audit, there existed no criteria for determining what constituted a "reasonable" cost. The *proposed* OMB Circular A-87 issued in October 1988 can not be used to provide an objective basis for finding that DLES' contracting practices during program years in question violated the JTPA at the time of the audit. (ALJ opinion, RDoc. 67, p. 9.)

As stated in the decision issued by the ALJ:

> . . . According to the Supreme Court, "[retroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In fact, the current law prohibits retroactive application of federal statute and administrative rules and regulations unless the plain language of the statute or regulation so dictates. *Id.* Where no such express language exists, retroactivity is presumptively barred unless clear congressional intent commands otherwise. *Landaraf v. USI Film Prods.*, 114 S.Ct. 1483 (1994) .
>
> Finding no express language in the JTPA or the accompanying regulations to support

> their retroactive application, I must conclude that there is no basis for enforcing the regulations on which USDOL bases its findings retrospectively. Likewise, I find no legislative intent to grant authority to USDOL to enforce rules retroactively under the JTPA. I also recognize that, "[e]ven where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant. *Bowen*, 488 U.S. at 208-209.
>
> In sum, since I find no specific violation of the JTPA or the accompanying regulations as set forth during the period of the audit, I find that DLES need not return to USDOL net profits realized from contracts with ESJS offices during the period covering program years 1984 through 1989. Accordingly, the Grant Officer must be reversed. [Footnote omitted.] (RDoc. 65, pp. 9 & 10.)

The order of the Secretary does not dispute the facts as rendered by the ALJ regarding OMB Circular A-87. Rather, the Secretary maintains that, "The lack of publication of a specific phrase doesn't negate the principle." (RDoc. 71, p. 10.) According to the Secretary, "[t]he enmeshed relationships between the parties to the Florida Job Services contracts signal a potential conflict of interest." (Emphasis added. RDoc. 71, p. 10.) Based upon this potential conflict of interest, the Secretary found that there was a contravention of "sound management practices."

There is no evidence in the record to support such a finding. Mr. Woodward testified that the audit team did not look at any contracts and determine them to be less than arms length transactions, nor were there factual allegations of improprieties or conflicts on the part of Florida when the USDOL-OIG Report was issued. (RDoc. 41, TR-pp. 247-257). USDOL further admitted that the auditors did not consider demonstrated performance, the populations served or the services provided, and they were not familiar with the criteria Florida utilized to award JTPA contracts nor did they review such procedures. (RDoc. 42, FLX-4 pp. 16-18.)

III.

FLORIDA PRESENTED CREDIBLE EVIDENCE TO SUPPORT THE LEGALITY OF ITS CONTRACTS.

In spite of the foregoing, the Secretary contends that the Grant Officer having met his burden of production, the burden or persuasion devolved upon Florida to show that the balance of the contracts (i.e. 249) entered into between DLET and the Service Delivery Areas subgrantees with the local Florida Employment Service offices met regulatory requirement governing fixed unit price performance based contracts (FUPPB) and are in compliance with 20 C.F.R. 629.38 (e)(2). (RDoc.71, p. 7.) The Secretary found that the State failed to do so. However, the record belies that conclusion.

a. The Intra-agency Contracts Were Negotiated at Arms Length.

The Secretary concedes that the fixed unit price, performance based contracts were permissible during the Programs Years in question (RDoc. 71, p. 9 & 11). The parties

so stipulated (see RDoc. 65, p. 2 Stipulation 9.) and Mr. Woodward so testified at trial (RDoc. 41, pp. 249-250). Again using the "arms length standard," the Secretary, nevertheless, concludes that where the contracting parties are organizationally linked, there has to be a punctilious showing that the contracts were rigorously negotiated. This focuses on the general method of contracting employed by the State.

Again, Mr. Woodward concedes that he did not examine the individual contracts within his audit in order to determine that the fixed unit price performance-based contracts were not negotiated at arms length. (RDoc. 41, pp. 218, 220, 230.) Likewise, Mr. Woodward did not look at the criteria according to which DLES awarded JTPA contracts. (RDoc. 41, p. 248.) Rather, Mr. Woodward examined the general scheme for issuing JTPA contracts in the State of Florida. (RDoc. 41, pp. 222, 248.) In other words, Mr. Woodward's audit focused primarily on the parties involved in the contracting, as opposed to the contracts themselves. Based on this, Woodward concluded that the contracts in question had the "appearance" of not having been negotiated at arms length. (RDoc. 41, p. 250.)

A review of the records reveals that Florida presented unrefuted testimony at the hearing concerning its contracting procedures, which demonstrated the extra precaution initiated by the Governor to assure open and free competition. (RDoc. 61, pp. 2430.) The evidence established that the Governor made an informed decision to require Employment Service offices to compete for contracts to provide JTPA and WPA services, even though section 287.057(f)(13), Florida Statutes, exempts governmental entities from the Florida law governing the competitive procurement selection process. (RDoc. 44, FIX-36.) Thereby, avoiding any conflict of interest, as well as any appearance of impropriety or favoritism to the ESJS.

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The historical development of the Job Training Partnership Act is integral to fully understand the authority accorded the State by JTPA in matters of contracting.

1. *HISTORICAL PERSPECTIVE*

The 97th Congress enacted the JTPA to replace the Comprehensive Employment and Training Act, a federally sponsored job training program, which had proven less than extravagantly successful; "informed opinion seems to suggest that *excessive federal involvement* was partially to blame for CETA's problems." *Hernandez-Colon v. Secretary of Labor*, 835 F.2d 958 (1st. Cir. 1988). With the failures of CETA in focus, Congress designed the JTPA and opined that the law would "substitute state management for federal management of the job training function, recognize the role of the state in all local programs, and end the excessive involvement of the federal government." *Id.* at 961, note 3, citing S. Rep. No. 469, 97th cong. 2d Ses. 2, reprinted in 1982, U.S. Code Cong. and Admin. News 2636, 2637.

Congress was also guided by four basic principles it deemed essential for an effective job training program, which required the Governor and private sector involvement, with emphasis on performance results.[7]

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7. The pertinent language of the principles held: First, the new legislation must provide for the involvement of the private sector in the design and administration of training programs . . .

Second, job training legislation must recognize the true principles of *federalism. . . . The new legislation will recognize the role of the state in all local programs and end the excessive involvement of the federal government.* (Cont'd)

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In recognition of these principles, see note 7 herein, which clearly supplanted the federal government from administration of the JTPA and gave the primary responsibility to the Governor, regulations were enacted at 20 C.F.R. parts 626 through 638. More specifically, the provision at 20 C.F.R. 627.1 embodies the fundamental notions of federalism[8] Congress sought to embrace in the JTPA, and required the Secretary and Governor to sign an agreement to include the following provision:

> . . . guidelines interpretations and definitions adopted by the Governor shall, to the extent that they are consistent with the Act and applicable rules and regulations, be accepted by the Secretary. (20 C.F.R. 627.1.)

(Cont'd)

Third, job training legislation must truly be a *training legislation* and not an *income maintenance program. . . .*

Fourth, the legislation must insist on performance. . . . It will *end federal involvement* with the process of how people are to be trained. It will provide for measurement of the outcomes and *remove the Federal government* from involvement in the details of program operations. (Emphasis added.) S. Rep. No. 469, supra, at 3, 1982 U.S. Code Cong. and Admin. News at 2637-2638.

8. The Senate in discussing its notion of federalism, provided in relevant part: Under the legislation reported by the Committee, the state will be the key actor in the approval of job training programs. First, *and perhaps most important, the state will define the structure of the delivery system through the determination of service delivery areas.* This critical determination will be done by *the Governor* after receiving the proposals of local government and business officials. The *Governor* will also be in charge of approving local developed plans, of monitoring and auditing the performance of plans, of insuring fiscal responsibility and compliance with Federal mandates as well as of running statewide programs. *In short, the basic supervisory role previously performed by the federal government will now be turned over to the state, the place where it really belongs.* (Emphasis added, *Id.* at 2638.)

Clearly, this provision captured the Congressional intent underlying the JTPA to respect and defer to the State's autonomy, and reinforced the system of dual sovereignty between the states and the national government, as established by the U.S. Constitution.

* * *

APPENDIX C — EXCERPTS FROM SUGGESTION OF REHEARING EN BANC FILED IN THE ELEVENTH CIRCUIT

* * *

ARGUMENT AND AUTHORITIES

INTRODUCTION

Florida sets forth the following issues for the Court's review and contends that they are worthy of en banc consideration for several reasons.

The matter before this court involves an understanding and interpretation of the JTPA and its regulations. While the law and its regulations are complex, Congress was emphatically clear on its desire through the legislation to recognize the role of the state in all local programs and to end the excessive involvement of the federal government. Legislative History of the JTPA at S. Rep. No. 469, 97th Cong. 2d Sess. 2 (1982), U.S. Code Cong. & Admin. News 1982, 2637.

The legislative history of the JTPA also reflects an unequivocal intent by Congress to achieve several goals: (1) to reinforce the system of dual sovereignty established by the Constitution; (2) to supplant the federal government from administration of the JTPA; (3) and to give the Governors of each State primary responsibility over state programs.

The Secretary's decisions in this case on matters of law are an attempt to usurp decisions made by the Governor, without expressed or implied statutory or regulatory authority to do so. The legislative history of the JTPA clearly indicate that the Secretary's intervention epitomizes the type federal intervention which Congress disavowed.

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While this court's order found that there was substantial evidence in the record to support the Secretary's decision, this court failed to review the legality and underlying authority of the Secretary to pre-empt the Governor regarding the issues discussed below.

Appellate Courts in several circuits have clearly recognized the authority of the Secretary to recover misspent funds under the JTPA. However, whether the Secretary has authority to recover funds that are not misspent, in contravention of the authority specifically accorded to the Governor pursuant to the JTPA, presents a legal issue of first impression and one of great importance to Florida and the job training community throughout this country.

I.

WHETHER THIS COURT HAS PROPERLY ACCORDED DECISIONS OF THE SUPREME COURT AND PRECEDENT OF THIS CIRCUIT WHICH HOLD THAT ADMINISTRATIVE DECISIONS BASED ON INCORRECT LEGAL PRINCIPLES CANNOT PROPERLY STAND; REVIEWING COURTS HAVE AUTHORITY AND RESPONSIBILITY TO CORRECT ERRORS OF LAW MADE BY AN ADMINISTRATIVE AGENCY DURING ITS DECISION MAKING PROCESS.

The Supreme Court of the United States has consistently emphasized the remedial role of a reviewing court in instances where administrative agencies have reached findings and conclusions found not to be in accordance with the law. In elaborating upon the responsibility of the reviewing court in that instance, the Supreme Court established the principle that when

an administrative agency has made an error of law, the Court has a duty to correct the error of law committed by that body. *N.L.R.B. v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & Gen. Pipefitters of New York, Local Union No. 38*, 429 U.S. 507, 97 S. Ct. 891, 51 L. Ed. 2d 1 (1977), quoting *I.C.C. v. Clyde S.S. Co.*, 181 U.S. 29, 21 S. Ct. 512, 45 L. Ed. 729 (1901). The Eleventh Circuit has followed this principle and echoed that it will not allow misconceptions in law that arise during the agency decision-making process to stand but rather will exercise authority and responsibility to correct those errors. *Florida Department of Labor v. U.S. Department of Labor,* 893 F. 2d 1319 (11th Cir. 1990). In that case this Court reviewed a Final Decision and Order of the Secretary of USDOL, which imposed prejudgment interest against the Florida Department of Labor, and considered whether the Secretary had authority to collect interest from States. While this court clearly recognized its independent obligation to review questions of law it also observed that an order cannot stand where the agency has misapplied the law whether or not either party raised the issue below. *Id.* at 1322. Accord also, *Pollgreen v. Morris,* 770 F. 2d 1536 (11th Cir. 1985), where this court reversed a decision of the Immigration and Naturalization Service which imposed a fine on owners of commercial fishing vessels for bringing aliens unlawfully into the United States. This court found that the agency's refusal to allow vessel owners to raise duress as a defense to the imposition of a fine was a question of law which was freely reviewable by the court. *Id* at 134.

During the case at bar, this court's blanket holding that substantial evidence in the record supports the Secretary's decision constitutes a deviation from its holding in *Florida Department of Labor,* and *Pollgreen,* supra, regarding several

important issues where the Secretary of USDOL made errors of law in the Final Agency Order.

a. It Was An Error Of Law For The Secretary To Ignore The Job Training Partnership Act And Its Regulations In Contravention Of The Governor's Authority Under The JTPA In The Area Of Procurement.

The law and the regulations regarding the Job Training Partnership Act clearly indicate that Congress intended States to exercise authority regarding procurement and there is no indication of any congressional intent, express or implied, to confer or delegate any authority to USDOL to promulgate substantive rules in the area of procurement. The Congressional intention regarding procurement is found at 20 C.F.R. sec. 629.34, which provides:

> Procurement. Subject to the provisions of section 107 of the Act, recipients and subrecipients shall administer procurement systems that reflect applicable State and local law, rules and regulations as determined by the Governor.

Pursuant to the above regulation, the Governor exercised his authority to establish policy which directed Florida to utilize fixed-unit-priced performance based contracts as the preferable method of contracting in Florida. Such utilization was not prohibited by the law or the regulations. It was not incumbent upon Florida to seek approval from USDOL on whether the contracting method utilized in Florida was appropriate nor was Florida's failure to seek approval violative of the law or regulations. There is no express or implied provisions in the

JTPA law or regulations which requires Florida to relinquish its autonomy over procurement, subject to the whims of the Secretary.

Additionally, it has been judicially recognized that when the 97th Congress designed the JTPA program, it clearly intended to substitute state management for federal management with a recognition of the state role in all local programs. *Hernandez-Colon v. Secretary of Labor,* 835 F.2d 958 (1st Cir. 1988).

b. It Was An Error Of Law For The Secretary And USDOL To Ignore Their Own Regulations.

By allowing USDOL to effectively usurp the authority of the Governor concerning the contracting method adopted by Florida, this court has deviated from a long line of cases in this circuit and other circuits as well, which require administrative agencies to adhere to their own regulations. It is well settled in the law that agencies are required to follow their own regulations. *Chicano Education and Manpower Service v. Department of Labor,* 909 F.2d 1320, 1327 (9th Cir. 1990), citing *Service v. Dulles,* 354 U.S. 363, 77 S. Ct. 1152, 1 L.Ed. 2d 1403 (1957); *Memorial, Inc. v. Harris,* 655 F. 2d 905, 910-11 n. 14 (9th Cir. 1980). Congress recognizes that it can only legislate, not administer, so it necessarily relies on agency action to make "common sense" responses to problems that arise during implementation, so long as those responses are not inconsistent with Congressional intent. *Cablevision System v. Motion Picture Assoc.,* 836 F.2d 599 (C.D. Cir. 1988). Even if the action of an agency is discretionary by statute, an agency's own regulations must be complied with by the agency. *California Human Development Corp. v. Brock,* 762 F.2d 1044, 1049 (D.C. Cir. 1985).

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This Court has allowed USDOL to ignore its regulations in several instances to the detriment of Florida. First of all, USDOL's contravention of the authority of the Governor is in direct conflict with the JTPA regulations at 20 C.F.R. sec. 627.1, which provide in part:

> To establish a continuing relationship under the Act, the Governor and the Secretary shall sign a Governor/Secretary Agreement . . . The agreement shall specify that guidelines, interpretations, and definitions adopted by the Governor shall, to the extent that they are consistent with the Act and applicable rules and regulations, be accepted by the Secretary.

Here, the Congressional intent underlying the JTPA, to respect and defer to the autonomy of States, is abundantly clear. Pursuant to the above provision, the Governor of Florida and the Secretary of USDOL signed an Agreement at the inception of the JTPA in 1983 whereby the Secretary of USDOL agreed to defer to the Governor's guidelines, interpretations and definitions, if such were not inconsistent with the applicable rules and regulations. (USX-1 pg. 88). The record clearly established that USDOL did not articulate or promulgate any rules or regulations during the period covered by the audit which prohibited use of the contracting methods followed by Florida.

Secondly, this Court has allowed USDOL to violate its own regulations regarding record retention, by holding Florida accountable for contracts that had been properly destroyed pursuant to federal provisions, even before USDOL conducted its audit of Florida's Revenue Account. The retention period found in USDOL's own regulations at 20 C.F.R. sec. 629.35 (e) provides:

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> The Governor shall insure that procedures are developed for retention of all records pertinent to all grants and agreements, including financial, statistical, property and participant records and supporting documentation, *for a period of three years* from the date of obligation of funds. . . . (emphasis added).

As contracts for program years 1983 through 1985 had been destroyed prior to the audit and prior to the time of the trial, it was impossible for Florida to produce said contracts and been prejudiced by the Court's sanctioning of USDOL's audit of the Florida's Revenue Account, which audit covered a seven year period, in disregard of USDOL's own regulations regarding records retention, which required a three year retention period for records.

c. It Was An Error Of Law For The Secretary To Disallow Costs Regarding Wagner Peyser Contracts Based On An Alleged Violation of 20 C.F.R. sec. 629.38 (e) (2).

USDOL conceded at the trial that the Wagner Peyser contracts in question were not required to adhere to the requirements of 20 C.F.R. sec. 629.38 (e)(2) because such contracts properly involved direct placements without the necessity of training. (TR-p. 191). The disallowance involved $35,230 of disallowance under the Wagner Peyser Act. Yet, the Secretary's order set forth a blanket disallowance without any deference to the distinction in law between contracts funded pursuant to the JTPA and those funded pursuant to Wagner Peysers, sec. (7) (b).

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d. It Was An Error Of Law For The Secretary To Disallow Costs Associated With The JTPA Contracts Based On An Alleged Violation Of 20 C.F.R. sec. 629.38 (e)(2).

The Secretary's decision found that the contracts violated 20 C.F.R. sec. 629.38 (e) (2) because they contained fixed unit price and cost reimbursement elements and provisions for placement without training. The finding is factually and legally erroneous.

There is nothing in the law or regulations which prescribes the presence of cost reimbursement elements in fixed unit price contracts. The Secretary failed to identify any law or regulation which prohibit provisions in fixed unit price contracts for reimbursing employers for costs associated with providing training and support services to JTPA participants. Indeed, USDOL has recognized and not condemned the presence of such terms in fixed unit price contracts. Particularly, in Training and Employment Guidance Letter No. 3-87, dated November 18, 1987, concerns about contracting practices, pursuant to 20 C.F.R. sec. 629.38 (e) (2) were addressed (AAPX - pgs. 14-28). USDOL instructed that cost reimbursement items in fixed unit price contracts must be clearly set forth. On this issue USDOL specifically cautioned:

> "If the contract contains cost-reimbursable areas (e.g., participant services on an as needed basis, like transportation and child care) as well as fixed unit price areas, are the reimbursement requirements and the performance-based payment requirements clearly delineated"? (AAPX - pg. 24).

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The cost reimbursable elements in the contracts produced, were clearly delineated according to USDOL's instructions and never constituted the full unit price. One contract produced by Florida contained provisions for direct placement of participants without training; however, the contract clearly set forth that such placements were at no cost to the JTPA program.

Further, the Secretary's opinion that Florida failed to follow sound business practices and that the contracts were not negotiated at arms length is not supported by any facts in the record, and furthermore, such opinion does not rise to the level of a legal violation. There is no factual basis in the record, as admitted by USDOL's own witnesses at the hearing, to support a claim of conflict of interest or less than arms length transactions in Florida's contracting process. (TR - pgs 229-230). The requirements the Secretary placed upon Florida's contracting methods constitutes incipient policies and errors of law.